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No. 79-39

In the Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE MARQUETTE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is unreported. The decisions of the Interstate Commerce Commission in the rulemaking proceeding (*id.* at 6a-87a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on April 26, 1979. A petition for rehearing was denied on May 30, 1979. The petition for a writ of certiorari was filed on July 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's prohibition of one-way trip leasing of vehicles by agricultural cooperatives for nonmember, nonfarm transportation is consistent with Section 203(b)(5) of the Interstate Commerce Act.

2. Whether the Interstate Commerce Commission's record keeping and notice requirements for agricultural cooperatives are within the Commission's statutory authority.

STATEMENT

In 1968, Congress enacted Pub. L. No. 90-433, 82 Stat. 448, as an amendment to the agricultural cooperative transportation exemption set forth in Section 203(b)(5) of the Interstate Commerce Act, 49 U.S.C. 303(b)(5).[1] The amendment was intended to restrict and clarify the scope of the exemption from Interstate Commerce Commission regulation afforded motor vehicles controlled and operated by agricultural cooperatives and to enable the Commission "to proceed more effectively against illegal operators masquerading as bona fide agricultural cooperatives." S. Rep. No. 1152, 90th Cong., 2d Sess. 2 (1968).

The 1968 amendment limited an agricultural cooperative's transportation for nonmembers who are neither farmers nor cooperative associations "to that which is incidental to [the cooperative's] primary transportation operation and necessary for its effective

[1]This provision has since been revised without substantive change and recodified as 49 U.S.C. 10526(a)(5). See Pub. L. No. 95-473, 92 Stat. 1337, 1364. Throughout this brief, we refer principally to the section numbers of 49 U.S.C. (1976 ed.) in effect at the time of the Commission's rulemaking decision.

performance." 49 U.S.C. 303(b)(5). It further provided that such nonmember, nonfarm transportation "shall in no event exceed 15 per centum of [the cooperative's] total interstate transportation services in any fiscal year, measured in terms of tonnage." *Ibid.* In addition, the amendment required that a cooperative intending to perform transportation for nonmembers who are neither farmers nor cooperatives must so notify the Commission prior to the commencement of such transportation, and it added a provision to Section 220 of the Act that specifically empowered the Commission to inspect the books, records, and other pertinent documents of any cooperative association required to give notice under Section 203(b)(5) as amended. 49 U.S.C. 320(g) (recodified as 49 U.S.C. 11144(c)).

In 1969, the Commission adopted regulations implementing the "incidental and necessary" test, tonnage restrictions, and notice requirements set forth in Pub. L. No. 90-433. 49 C.F.R. 1047.20 *et seq.*[2] However, as a result of numerous investigations and court proceedings, the Commission determined that its 1969 regulations were not effective in preventing illegal operations carried out by "sham" cooperatives and other organizations claiming the agricultural cooperative exemption (Pet. App. 9a, 15a). To remedy this problem, the Commission in 1977 promulgated new regulations that (1) added a single sentence to the Commission's existing regulation at 49 C.F.R. 1047.21(a) to make explicit that one-way trip leasing of vehicles by a cooperative for nonmember, nonfarm transportation does not meet the "incidental and necessary" test; (2) established a record keeping requirement for cooperatives engaged in nonmember, nonfarm

[2]No party sought judicial review of the Commission's 1969 implementing regulations.

transportation; and (3) revised the notice requirement set forth in the existing regulations to provide for more detailed and current notice to be given the Commission by cooperatives proposing to engage in nonmember, nonfarm transportation. It is these revisions to the Commission's regulations that are at issue in this case.

The court of appeals upheld the Commission's new rules in all respects. The court held that "explicit prohibition of one-way trip-leased movements is a rational exercise of the Commission's rulemaking authority and is fully consistent with Congressional intent" (Pet. App. 4a). The court also sustained the record keeping and revised notice requirements as reasonable and necessary for the Commission to carry out its enforcement responsibilities under Section 203(b)(5) (*ibid.*).

ARGUMENT

The court of appeals' decision is correct, does not conflict with any decision of this Court or any court of appeals, and does not warrant further review.

1. The Commission's explicit prohibition of one-way trip leasing by an agricultural cooperative for nonmember, nonfarm transportation is, as the court below correctly held (Pet. App. 4a), a reasonable interpretation of the Act and in full accord with congressional intent.

As indicated in the legislative history of the 1968 amendment to Section 203(b)(5), the "incidental and necessary" test requires that a cooperative's nonmember, nonfarm transportation have the direct relationship to its farm-related transportation that was found in *Northwest Agricultural Cooperative Association* v. *ICC*, 350 F. 2d 252 (9th Cir. 1965), cert. denied, 382 U.S. 1011 (1966). See H.R. Rep. No. 1667, 90th Cong., 2d Sess. 5 (1968); S. Rep. No. 1152, 90th Cong., 2d Sess. 12-13 (1968). The

Northwest case involved nonmember, nonfarm transportation that was limited to shipments moving in otherwise empty trucks on their return from hauling members' farm products to market. The court held that such transportation was "incidental and necessary" because it provided a backhaul to make an outbound farm-related shipment for a member of the cooperative economically feasible. 350 F. 2d at 255.

In contrast to the transportation described in *Northwest*, one-way trip leases for nonmember, nonfarm shipments are wholly unconnected with prior or subsequent farm-related movements by an agricultural cooperative and do not eliminate empty backhauls that would otherwise occur. As the Commission (Pet. App. 71a, 74a) and the court below (*id.* at 4a) properly held, such one-way trip leasing, by its very nature, is not "incidental or necessary" as that phrase was used by Congress. Thus, the Commission's construction of the Act is consistent with congressional intent.[3]

Moreover, as the court below noted (Pet. App. 3a-4a), one-way trip leases were implicitly prohibited by the Commission's 1969 regulations, which defined "incidental and necessary" to include only nonmember transportation "performed with the same trucks or tractors employed in a prior or subsequent trip in the primary transportation operation of the cooperative association" (49 C.F.R.

[3]The courts have consistently interpreted the phrase "incidental and necessary" as precluding a cooperative from engaging in nonmember, nonfarm traffic not directly related to a prior or subsequent farm-related movement, regardless of the economic benefits accruing to the cooperative. See, *e.g.*, *ICC* v. *Milk Producers Marketing Company*, 405 F. 2d 639, 641-642 (10th Cir. 1969). See also *Munitions Carriers Conference, Inc.* v. *American Farm Lines*, 415 F. 2d 747, 750 (10th Cir. 1969).

1047.21(a)). Hence, the new rule "merely makes explicit the implicit prohibition against one-way trip leasing contained in section 203(b)(5) and the Commission's existing regulations" (Pet. App. 3a). The construction of a statute by the agency charged with its administration " 'should be followed unless there are compelling indications that it is wrong.' " *Beal* v. *Doe*, 432 U.S. 438, 447 (1977). The Commission's construction of Section 203(b)(5), consistently adhered to since its enactment, was therefore properly sustained by the court of appeals.[4]

2. Petitioners' assertion (Pet. 15-17) that the Commission exceeded its statutory authority in adopting the record keeping and revised notice requirements is without merit and was correctly rejected by the court of appeals (Pet. App. 4a).

The Commission adopted the record keeping requirements pursuant to its general authority to administer the provisions of the Interstate Commerce Act (Pet. App. 20a-21a, 47a, 76a-77a). See Section 204(a)(6) of the Act, 49 U.S.C. 304(a)(6) (recodified as 49 U.S.C. 10321).[5] Under its general administrative authority, "the Commission has the power to adopt regulations to carry out the policies of the laws which it administers if such regulations have a reasonable and rational basis, even though no specific authority to promulgate regulations on

[4]Contrary to petitioners' assertion (Pet. 15), the Commission considered the energy and environmental impact of its rulemaking decision (Pet. App. 74a-75a). As the court below held (*id.* at 4a), "the Commission explicitly considered the energy and environmental implications of its action and reasonably concluded that the prohibition on one-way trip leasing should have no significant impact" in those areas. In any event, the Commission's rulemaking proceeding simply clarified existing law on one-way trip leasing and thus did not constitute a major action requiring assessment of energy or environmental impact.

[5]The Commission also referred (Pet. App. 47a, 77a) to its authority under Section 220(g), 49 U.S.C. 320(g), discussed at page 7, *infra*.

the subject is contained in the statute." *Greyhound Corp.* v. *United States*, 221 F. Supp. 440, 444 (N.D. Ill. 1963). Accord, *American Trucking Assn's* v. *United States*, 344 U.S. 298, 309-313 (1953); *United States* v. *Resler*, 313 U.S. 57, 60-61 (1941).

In this case, the Commission's authority to enforce the limitations set forth in Section 203(b)(5) had been frustrated by the failure of some cooperatives to maintain records of their nonfarm, nonmember transportation (Pet. App. 46a, 76a). The record keeping requirements in the amended regulations were designed to eliminate this impediment to effective enforcement of the statutory limitations. As the court below held (*id.* at 4a), "the record keeping requirements * * * are needed if the Commission is to fulfill its statutory responsibility to enforce the tonnage limitations in §203(b)(5)."

Petitioners further contend (Pet. 15-16) that the record keeping regulation violates the proviso clause of Section 220(g), 49 U.S.C. 320(g) (recodified as 49 U.S.C. 11144(c)). Section 220(g) authorizes the Commission to "have access to and * * * to inspect, examine, and copy any and all accounts, books, records, memorandums, correspondence, and other documents," subject to the proviso that "the Commission shall have no authority to prescribe the form of any accounts, records, or memorandums to be maintained by a cooperative association * * *."[6] Section 220(g) explicitly enhances the power of the Commission to obtain information necessary to the enforcement of the Act (Pet. App. 47a, 77a), and the limitation contained in the proviso cannot be read to

[6]Various sections of the Interstate Commerce Act specifically authorize the Commission to impose a uniform system of accounts, records and memoranda on carriers and certain other persons subject to the Act. See Sections 20(5), 220(d), 49 U.S.C. 20(5), 320(d) (recodified as 49 U.S.C. 11142, 11144).

defeat the agency's basic authority. Moreover, the record keeping requirement is not inconsistent with the proviso clause of Section 220(g) because it does not prescribe the form of any records that agricultural cooperatives must keep but simply requires cooperatives to maintain certain nonmember transportation information in their records in whatever form they choose. As the court of appeals observed (Pet. App. 4a), "[t]he regulations do not run afoul of §220(g) since they only require that certain information be recorded and do not dictate the form in which that information is to be kept."

Petitioners' final challenge is to the revised notice requirements (Pet. 16). The Commission adopted these provisions pursuant to the mandate of Section 203(b)(5) that any cooperative performing interstate transportation for nonmembers "shall notify the Commission of its intent to perform such transportation prior to the commencement thereof." The revised notice requirements merely require a cooperative proposing to engage in nonmember transportation to inform the Commission of certain minimal but essential facts relating to its current identity, organization, and storage of records. As the court below properly concluded (Pet. App. 4a), "[t]he Commission's regulations are not overly burdensome and are reasonably designed to provide the Commission with the information needed to determine whether those cooperatives proposing to engage in nonfarm, nonmember transportation are rightfully entitled to the exemption under §203(b)(5)."[7]

[7]Petitioners also complain (Pet. 16-17) that the requisite certification under the revised notice regulation, made subject to criminal sanction pursuant to 18 U.S.C. 1001, violates the Fifth Amendment because it "require[s] impossible knowledge of future acts and complicated legal issues * * *." However, this contention is both premature (see, *e.g.*, *O'Shea* v. *Littleton*, 414 U.S. 488, 497-498 (1974)) and insubstantial (see, *e.g.*, *United States* v. *Weatherspoon*, 581 F. 2d 595, 601 (7th Cir. 1978)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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